United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-2509

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

No. 74-2509

P/S

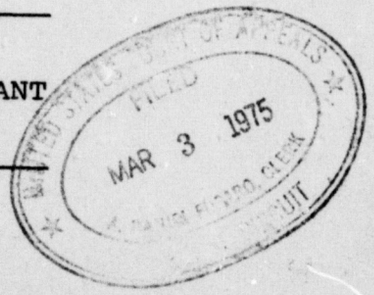
DAVID ARBEITMAN,
Petitioner-Appellant

v.

DISTRICT COURT OF VERMONT,
UNIT NO. 5, WASHINGTON CIRCUIT:
HON. JOHN P. CONNARN, PRESIDING JUDGE,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF OF PETITIONER-APPELLANT



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1. Does 13 V.S.A. Sec. 1026(5), as written and as construed, violate the First and Fourteenth Amendments to the United States Constitution due to substantial overbreadth?

2. Does 13 V.S.A. Sec. 1026(5), as written and as construed, violate the Due Process Clause of the Fourteenth Amendment due to vagueness?

3. Assuming the judicial gloss placed on 13 V.S.A. Sec. 1026(5) by the Vermont Supreme Court saves its constitutionality, can the statute as construed operate retroactively consistent with the Due Process Clause of the Fourteenth Amendment?

ARGUMENT

1. STATEMENT OF THE CASE

On May, 11, 1972, petitioner was one of some thirty-five people who took part in a peaceful demonstration in front of the federal building in Montpelier, Vermont to protest United States involvement in Southeast Asia. The demonstration was peaceful involving no violence, destruction of property or profanity. (T.49,50,61,62,77,78) The demonstration was permitted to continue for three hours. Thereafter, the State's Attorney for Washington County advised the demonstrators that the law prohibited obstructing pedestrian traffic and warned them that they would be arrested unless they dispersed within ten minutes. The demonstrators heeded this warning and removed themselves from the sidewalk in front of the post office.

Petitioner was present and heard the State's Attorney's warning. However, when the other demonstrators dispersed, he sat down in front of the door to the post office, which opens outward onto the street. He sat facing the street with his back against the door. Petitioner is 5'2" and weighs 115 lbs.

During a five minute span prior to his arrest, two or

three people attempted and gained entrance to the post office by squeezing through sideways. (T.60) After observing this for about five minutes, a Montpelier police officer approached the petitioner, requested that he go with him, and bent over and put his hand under his arm. As he did so, petitioner stood up and walked off with him. After they had walked approximately fifteen yards toward the county courthouse, the officer advised him that he was under arrest. (T.60) Subsequently, he was charged by an officer's complaint with obstructing pedestrian traffic with intent to cause public annoyance and inconvenience, in violation of 13 V.S.A. Sec. 1026(5). On the day of his arrest, petitioner was released after posting twenty-five dollars bail. Bail has been continued and is presently in force. 1/

On June 28, 1972, after a trial by jury, petitioner was convicted and sentenced to five days confinement in the State Correctional Facility and to pay a fine of $100.00. Execution of sentence was stayed to permit an appeal.

On December 4, 1973, the Vermont Supreme Court

1/ Petitioner has never raised the question of whether the State lacked jurisdiction to try him for a criminal offense committed on property owned by the federal government. Compare State v. Mack, 23 Nev. 359, 47 P.763 (1897) with City of Cincinnati v. Nussbaum, 14 Ohio Misc.19, 23? N.E.2d 152 (Mun. Ct. Crim. Div.1968). Cf. United S[illegible] v. Johnson, 426 F.2d 1112 (7th Cir.) cert. d[illegible] 400 U.S.842 (1970).

affirmed the conviction and rejected petitioner's arguments that 13 V.S.A. Sec. 1026(5) is unconstitutionally vague and overbroad. On April 18, 1974, a petition for a writ of habeas corpus was filed in the United States District Court for the District of Vermont. On October 7, 1974, Judge Coffrin filed an Opinion and Order holding that the statutory language was not vague, and that as construed by the Vermont Supreme Court, not overbroad. The Court granted the State's motion to dismiss the petition.

Petitioner filed a Notice of Appeal from this ruling and Judge Coffrin issued a certificate of probable cause as required by law. Successive stays of execution have been obtained. 2/

II. 13 V.S.A. SEC. 1026(5) VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS SUBSTANTIALLY OVERBROAD

The First Amendment overbreadth doctrine applies when a statute lends itself to a substantial number of impermissible applications such that it is capable of deterring conduct protected by the First Amendment. 3/

2/ The petitioner is "in custody" within the meaning of Hensley v. Municipal Court, 93 S.Ct. 1571(1973). For conditions governing admission to bail in Vermont, see 13 V.S.A. Sec. 7551 et seq.

3/ See generally, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

Where conduct, and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 4/ It is also academic that a person may launch an attack against the facial validity of a statute on overbreadth grounds even though his own conduct was such that it could be legitimately proscribed. 5/

23 V.S.A. Sec. 1026(5) provides, in pertinent part:

> "A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:
>
> (5) obstructs vehicular or pedestrian traffic, shall be imprisoned for not more than 60 days or fined not more than $500.00 or both."

It has been repeatedly held that publicly owned streets and sidewalks and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. 6/ The legal standard to be applied

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4/ Broadrick v. Oklahoma, 93 S.Ct. 2908 (1973).

5/ Grayned v. City of Rockford, 408 U.S. 104,114 (1972).

6/ Loving v. Griffin, 303 U.S. 444 (1938); Hague v. CIO, 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Jamison v. Texas, 318 U.S. 413 (1943); Cox v. Louisiana, 379 U.S. 536 (1965).

in determining whether a statute which affects both speech and conduct passes constitutional muster is that which is set out in United States v. O'Brien, 391 U.S. 367 (1968). O'Brien held that where speech and non-speech elements are combined in the same course of conduct, the statute may be constitutionally applied only if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on asserted First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Petitioner concedes that "governmental authorities have the duty and responsibility to keep their streets open and available for movement," 2/ and that the first three criteria of O'Brien are met. However, in order for its validity to be sustained, the incidental restriction on freedom of expression must be narrowly circumscribed. Vermont's disorderly conduct statute, as written, would prescribe all parades, street assemblies and protest demonstrations, all labor picketing and any other concerted activity that might cause an obstruction of pedestrian traffic.

2/ Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

The Vermont Supreme Court apparently recognized the unconstitutional sweep of the statute and attempted to remedy it by adding a judicial gloss:

> "In light of the purpose and effect of this section, it is not unconstitutionally vague or overbroad on its face. As we consrue the statute, one cannot be convicted of obstructing traffic with the intent to annoy the public if his intent is to annoy by obstructing by spewing words or ideas at them which they may find offensive, abusive or distasteful. The obstruction must be a physical obstruction, a result of the body or objects and not of minds or words."

While this construction made clear that "pure speech" could not be the basis for arrest and conviction under the statute, it did nothing to ameliorate the statute's intrusion into speech related conduct also protected by the First Amendment. Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968). Peaceful picketing almost always involves a physical obstruction as does parading or protesting. Presumably, under the Court's construction, a person can stand on a streetcorner "spewing words," but if he approaches a passerby and attempts to give him a handbill or engage him in conversation he has caused a "physical obstruction." Cf. People v. Carcel, 3 N.Y.2d 327, 144 N.E.2d 81 (1957); People v. Nixson, 248 N.Y. 182,

161 N.E. 463 (1928). 8/

In Colten v. Kentucky, 407 U.S. 104 (1972), the defendant had been convicted under a state statute bearing a marked similarity to Vermont's disorderly conduct statute. Ky. Rev. Stat. Sec. 437.016(1)(f) (Supp. 1968), provided:

> "(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse...."

The defendant argued on the basis of Cox v. Louisiana, 379 U.S. 536 (1965), that the statute was overbroad because, "it permitted conviction where the mere expression of unpopular views prompted the order (to move on) that is disobeyed." Colten v. Kentucky, 407 U.S. 104,111 (1972).

As written, the statute would clearly have been struck down for overbreadth. It was the Kentucky Supreme Court's construction of the required intent that saved it. The

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8/ The statutory language is also broad enough to permit the arrest of a demonstrator for "obstructing vehicular or pedestrian traffic" even though the obstruction is caused by curious motorists or bystanders. See Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773, 1775-77 (1967).

Court had ruled:

> "As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done 'with intent to causepublic inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' is that the specified intent must be the predominant intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitutional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise."

The United States Supreme Court upheld the statute as construed:

> "As the Kentucky statute was construed by the state court, however, a crime is committed only where there is no bona fide intention to exercise a constitutional right- in which event, by definition, the statute infringes no protected speech or conduct- or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed insubstantial. The court hypothesized, for example, that one could be convicted for disorderly conduct if at a symphony concert he arose and began lecturing to the audience on leghorn chickens. '487 S.W.2d at 377. In so confirming the reach of its statute, the Kentucky court avoided the shortcomings of the statute invalidated in the Cox case. Individuals may not be convicted under the Kentucky statute merely for expressing unpopular or annoying ideas. The statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is "miniscule" compared to a particular public interest in preventing that expression or conduct at that time and place." 92 S.Ct. at 1957-58.

Such a standard, unlike that adopted by the Vermont Supreme Court, protects the legitimate exercise of free expression including protected conduct. The Vermont court held that Colten represented just one approach that could be taken to the problem and was not necessary to save Vermont's statute. Petitioner believes that it is constitutionally mandated.

Even if Vermont's statute could be saved by a less rigorous construction than set forth in Colten, the judicial gloss placed on Section 1026(5) is constitutionally inadequate because it fails to make any provision for constitutionally protected conduct. Coates v. City of Cincinnati, 402 U.S. 611 (1971); Rasche v. Board of Trustees of the University of Illinois, 353 F. Supp. 973 (D. Ill. 1972). The statute as interpreted suffers from the same vice it had when written. 9/

In United States v. Jones, 365 F.2d 675 (2d Cir. 1966), members of SNCC chained themselves to iron bars covering the windows of the United States Courthouse at Foley Square in such a manner that persons with business in the courthouse had to force their way through or use a side entrance. They

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9/ Cf. Gooding v. Wilson, 405 U.S. 521, 527(1972); Coates v. City of Cincinnati, 402 U.S. 613 (1971); Giaccio v. Pennsylvania, 382 U.S. 399,403-404 (1966); Cramp v. Board of Public Instruction of Orange Co., Fla., 368 U.S. 278, 285 (1961); Lewis v. City of New Orleans, 94 S.Ct. 970 (1974).

were prosecuted under Section 722(2) of the New York Penal law which prohibited persons from acting "in such a manner as to annoy, disturb, interfere with, obstruct, and be offensive to others," with the intent to provoke a breach of the peace and under circumstances whereby a breach of the peace might be occasioned. The defendants attacked the statute for vagueness and overbreadth.

Crucial to the circuit court's rejection of the First Amendment attack were several decisions of the New York Court of Appeals narrowly construing the statute and holding it inapplicable to peaceful demonstrations which caused minor inconvenience to passers-by. One of these, People v. Carcel, 3 N.Y.2d 327, 144 N.E.2d 81 (1957), is particularly instructive. The defendants were picketing in front of the visitors entrance to the United Nations building. It was alleged that they approached passers-by and handed them or attempted to hand them leaflets and that "by their actions the defendants did interfere with and obstruct the free entrance and egress of persons through above (sic) mentioned visitors' entrance;..." 144 N.E.2d supra at 83.

In holding that the statute required something more than a mere inconveniencing of pedestrians to support a conviction, the court observed:

> "As was stated in People v. Nixon, (sic) 248 N.Y. 182, 187-188, 161 N.E. 463, 466, "Men and women constantly congregate or walk upon the streets in groups, quite oblivious to the fact that in some degree they are thereby causing inconvenience to others using the street. A public meeting may have aroused such interest that groups of men and women continue the discussion while walking up and down the street. Groups linger in quiet social converse after the religious edifice where services have been held is emptied. School children and college youths, laborers, athletic 'fans,' and church members, perhaps even judges, do at times congregate or walk upon the streets in numbers sufficient to cause other pedestrians to stand aside or step into the roadway. Surely, such conduct is not always 'disorderly,' and does not always tend to a breach of the peace." In the Nixon case it was held that there was insufficient evidence to warrant a conviction under subdivision 2 of section 722 although it was shown that the 20 defendants were parading on a New York City street 4 abreast on a sidewalk only 12 feet wide. "The regular amount of traffic was just barely getting through" (248 N.Y. at page 185, 161 N.E. at page 465) and the obstruction caused by the pickets was such that some people were caused to enter the roadway to pass."
> 144 N.E.2d supra at 84.

It is perfectly clear that the protected activities of the picketers in People v. Carcel, supra, could be successfully prosecuted under 13 V.S.A. Sec. 1026(5), as construed by the Vermont Supreme Court. Only when the statute is limited by a construction such as that applied in Colten v. Kentucky, supra, do crucial constitutional values enjoy a measure of protection.

In the case at bar, the District Court held that if the statute simply made it a criminal offense to obstruct pedestrian traffic, it would clearly be overbroad. However,

the court held that by extending only to those with "intent to cause public inconvenience or annoyance or recklessly creating a risk thereof," the statute effectively protects innocent First Amendment activity. But any protest activity will most likely inconvenience or annoy members of the public. And intent may be inferred from surrounding facts.

In this case the question of intent was developed by the state as follows:

"Q. Did you intend to sit down where you did in front of that door?

A. Just before I did it, yes.

Q. Did you understand that the consequence of that act would mean you would have to be forcefully pushed out of the way?

A. I didn't really know what was going to happen.

Q. After the first time this occurred, did you realize this would have to occur in the future?

A. I realized if anybody else had to get in they would probably shove me aside as they did the first time.

Q. They would have to - isn't that correct?

A. Yes.

Q. After the first time you were pushed aside, didn't you intend remaining sitting there; that anyone else would have to push you aside?

A. That wasn't my intention. My intention was to make a symbolic gesture."
(T. 82)

The court instructed the jury that, The law provides that

everyone is presumed to intend the natural and probable consequences of his voluntary act." Thus the requirement that the defendant must have intended to cause public inconvenience and annoyance, or at least created a risk of that happening, is presumed to flow from the act of "obstruction" itself. Only if the jury is instructed that it must consider the primary intent of the actor as in Colten are First Amendment interests adequately protected.

The District Court held that even if the statute were overbroad as written, the Vermont Supreme Court's interpretation requiring the 'obstruction' to be caused by physical activity and not by words or ideas, cured any constitutional defect. After declaiming that it was not in a position authoritatively to construe the Vermont statute, the federal court went ahead to do precisely that. The court held that,

> "it seems a fair interpretation of the Vermont Court's language to say that it covers all First Amendment activity. The Court said that obstruction by words or ideas would be insufficient, without specifying whether the ideas were to be conveyed orally or symbolically."

But it is also true that the Vermont Supreme Court drew a sharp line between verbal and physical obstructions. The Vermont Supreme Court has not made its intention clear and it is not the function of the federal district

court to speculate concerning the meaning of the statute as construed. The statute still suffers the vice of overbreadth. Lewis v. City of New Orleans, 94 S. Ct. 970 (1974).

In its memorandum of law in the United States District Court, the state relied exclusively on State v. Albers, 303 A.2d 197 (N.H.1973) and Grayned v. City of Rockford, 408 U.S. 104. These cases are easily distinguished.

State v. Albers, supra, upheld convictions under a New Hampshire statute making it a crime to fail to withdraw from a mob action. "Mob action" was defined as "the assembly of two or more persons to do an unlawful act." Defendants' overbreadth and vagueness attacks focused on two terms in the definition: "to do" and "unlawful act." Support for defendants' position came from Landry v. Daley, 280 F. Supp. 938 (N.D.Ill.1968) rev'd on other grounds sub nom. Boyle v. Landrey, 401 U.S. 77 (1971), invalidating an identical statute.

The New Hampshire Supreme Court noted that the State Supreme Court in Landrey had not had the opportunity to construe the statute. It then construed "unlawful act" to mean unlawful "criminal" acts and "to do" to proscribe assemblies only where the criminal action is "real, immediate and probable." The Court was aided by legislative history

that demonstrated the intention of the legislature to discourage the type of violent and destructive riots that had taken place shortly before the bill was introduced, and not to hinder peaceful assembly. The Court held that, as construed, the statute did not sweep within its ambit an appreciable amount of constitutionally protected activity.

Where a statute addresses itself to the imminent commission of an unlawful criminal act, the need for ascertaining the "predominant" intent of the actor is diminished. However, a prohibition against "obstructing pedestrian traffic" is demonstrably not in this category. Every physical obstruction is not a violation of the criminal law. 10/

Grayned v. City of Rockford, supra, simply made clear that regulations which may have the effect of infringing on protected expression must be considered sui generis, taking into consideration "the nature of the place" and "the pattern of its normal activities." Id. 408 U.S. at 117. Cameron v. Johnson, 390 U.S. 611 (1968), is a case in point. There the Supreme Court upheld a statute prohibiting "picketing...in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any...

10/ Cf. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Cox v. Louisiana, 379 U.S. 536 (1965); Garner v. Louisiana, 368 U.S. 157 (1961); Rasche v. Board of Trustees of the Univ. of Illinois, 353 F.Supp. 973,977 (D. Ill.1972); Kirkwood v. Loeb, 323 F.Supp. 611 (W.D. Tenn. 1971).

county...courthouses...." Id. at 616. This was a narrowly drawn statute to ensure that the important business of the courts would not be hampered by pickets preventing people from entering and leaving. Statutes of this sort have been upheld so that the business of the government, schools, jails and the like may continue without interruption. This is a far cry from Vermont's statute which forbids any obstruction of any pedestrian traffic, anytime, anywhere. Not only is the statute overbroad under the O'Brien test, but also it fails to set forth any standards by which local officials could decide what assemblies to permit and which to prohibit. Cox v. Louisiana, 379 U.S. 536 at 556.

Petitioner has advanced a separate argument in his petition for habeas corpus that the failure to instruct the jury on intent in accordance with Colten v. Kentucky, supra, violated the First Amendment and the Due Process Clause. He argued this point to the Vermont Supreme Court by pointing out that under the statute, a woman could be convicted for pushing a babycarriage on a busy sidewalk. The Court answered this by saying:

> "The jury was told that it could find the appellant guilty only after finding that he had both actually intended to cause public inconvenience or annoyance and had obstructed pedestrian traffic. This charge, viewed in its entirety, was adequate, and a conviction under sec. 1026(5) was not erroneous thereunder."

However, the Court also upheld the judge's charge that "everyone is presumed to intend the natural and probable consequences of his voluntary acts." Obviously, the natural and probable consequence of any parade or street demonstration would be to obstruct traffic and to inconvenience the public. It is apparent that the statute lends itself to all kinds of abuses unless the jury is instructed to consider whether the actor's predominant intent was to exercise a constitutional right. Assuming that it was, then that interest must be balanced against the rights of the public. By this process, both interests are given a measure of protection. 11/

III. 13 V.S.A. SEC. 1026(5) AS WRITTEN AND AS CONSTRUED, IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Before the court can reach the issue of non-First Amendment statutory vagueness, it must satisfy itself that the vagueness is so central to the meaning of the statute that "as applied" and "facial" attacks are practically merged. Unlike the overbreadth doctrine, which

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11/ In this case the petitioner testified at length that his action was taken to protest the war in Southeast Asia. (T. 51,62,76,77,78,80,82,84) Applying the Colten formula, the jury should have considered whether that interest was insignificant compared to the resultant inconvenience to the public.

permits facial attacks by persons whose own conduct could be legitimately proscribed, attacks for facial vagueness have traditionally been denied to "hard-core" violators. Since there is no question that the petitioner sat down in front of the door to the post office, he would appear to be a "hard-core violator."

In Smith v. Goguen, 94 S.Ct. 1242 (1974), the Supreme Court articulated the circumstances in which courts will entertain facial vagueness attacks brought by "hard-core violators." The defendant had been convicted for publicly treating "contemptuously" the United States flag:

> "Appellant's exhaustion of remedies argument is premised on the notion that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L.Ed. 2d 214 (1971). Such a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is

> particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness because it subjected him to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preferences for treatment of the flag." 94 S.Ct. at 1249-1250.

The term, "obstructs pedestrian traffic," is not a comprehensible normative standard. As construed by the Vermont Supreme Court, no one who wished to picket peacefully outside a store or take part in a protest demonstration could know whether he would be subject to arrest. It is perfectly legitimate for participants in a picket line to accost patrons of a restaurant and attempt to hand them literature or explain to them their grievances with the management. Yet, under the court's construction, this would constitute a physical obstruction of pedestrian traffic for which they could be arrested and convicted. In fact, among the definitions of "obstruct" given to the jury was: "To hinder from passage."

In Cameron v. Johnson, 390 U.S. 611 (1968), the Court held the term "obstruct" to be not unconstitutionally vague. While that is undeniably true in the context of a statutory prohibition against preventing people from

entering and leaving a courthouse, a blanket prohibition against obstructing "pedestrian traffic" is totally without definition. It affords no more of a "core" than the "treats contemptuously" language found wanting in Smith v. Goguen, supra.

The vagueness is compounded by the statutory language that guilt is complete when a person acts with the intent to cause public inconvenience or annoyance or recklessly creates a risk thereof. Absent a construction like the Kentucky Supreme Court gave to the identical language in Colten v. Kentucky to identify the predominate intent, any "speech-plus" conduct would be punishable if that conduct might give offense to a member of the public. This is no different in kind from the statute struck down in Coates v. Cincinnati, 402 U.S. 611 (1971).

Due Process requires that all "be informed as to what the state commands or forbids...." Lanzetta v. New Jersey, 306 U.S. 451 (1937), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. Connally v. General Construction Co., 269 U.S. 385 (1932). The Vermont statute fails to meet this standard for the reason that any time someone takes to the streets to demonstrate or leaflet he is bound to inconvenience or annoy someone, or create a risk of doing so. Every time he approaches a passerby, he "obstructs

pedestrian traffic," as defined by the Vermont Supreme Court.

In Hague v. CIO, 307 U.S. 496, 515-16 (1939), Mr. Justice Roberts said:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."

Since Hague, the Supreme Court has repeatedly reaffirmed the First Amendment right of access to public places for expression of views - subject, of course, to reasonable regulations narrowly drawn to protect other competing interests. 12/ The Vermont disorderly conduct statute is not narrowly drawn or narrowly construed. Rather, "on its face (it) precludes all street assemblies and parades, ..." Cox v. Louisiana, 379 U.S. 536, 556 (1965). As such, it cannot be permitted to stand.

12/ Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972). See Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948).

IV. ASSUMING THAT THE JUDICIAL GLOSS PLACED ON 13 V.S.A. 1026(5) SAVES ITS CONSTITUTIONALITY, THE DUE PROCESS CLAUSE REQUIRES THAT THE STATUTE AS THUS CONSTRUED SHALL HAVE PROPSPECTIVE EFFECT ONLY AND CANNOT BE USED TO SUSTAIN THE PETITIONER'S CONVICTION FOR CONDUCT WHICH OCCURRED PRIOR TO THE VERMONT SUPREME COURT'S CONSTRUCTION

Traditionally, the Supreme Court has allowed penal statutes the benefits of whatever clarifying gloss state courts have added in the course of litigation in the very case at bar. Cox v. New Hampshire, 312 U.S. 563 (1941); Chaplinski v. New Hampshire, 315 U.S. 568 (1942); Winters v. New York, 333 U.S. 507, 514-15 (1948). See generally Amsterdam, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67,73-74 n.34 (1960). However, the continued vitality of that line of cases is now open to question.

In Bouie v. City of Columbia, 84 S.Ct. 1697 (1964), the Supreme Court overturned the appellants' convictions because the statute under which they were charged had been subsequently expanded by judicial construction. The Court said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute', for

> "The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss..." Freund, The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 541 (1951).
>
> See Amsterdam, Note, 109 U.Pa.L.Rev. 67, 73-74 n.34.
>
> If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id. at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise." Id. at 1702.

Since Bouie, the Court has held that,

> "Where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act." Ashton v. Kentucky, 384 U.S. 195, 198 (1966); See Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

Most recently, in Smith v. Goguen, 94 S.Ct. 1242, 1250 (1974), Justice Powell adverted to "The problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute,..."

The doctrine that the defendant is bound by a narrowing construction applied to a statute in his case is a legal fiction. As the commentators have pointed out, 13/ it is logically insupportable to require people to prophesy, at their peril, what conduct under a vague statute will be deemed allowable by a subsequent state court construction.

13 V.S.A. Sec. 1026(5), as written, plainly could not withstand a First Amendment or vagueness attack. This was implicitly recognized by the Vermont Supreme Court which placed a clarifying gloss on the statute, distinguishing between verbal and physical obstructions. At the time of petitioner's arrest, a demonstrator could not possibly have known whether he could be criminally punished for a peaceful street demonstration. The statute as written offended due process. To apply a later construction retroactively would deprive anyone arrested previously of fair warning. United States v. Lane, 361 F. Supp. 380, 382 (C.D.Cal. 1973). Cf. Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965).

The Vermont Supreme Court apparently believed that the charge to the jury cured the defect. The Court said:

> "The jury was told that it could find the appellant guilty only after finding that he had both actually intended to cause public inconvenience or annoyance and had obstructed pedestrian traffic. This charge, viewed in its entirety, was adequate, and a conviction under section 1026(5) was not erroneous thereunder."

But the charge did not anticipate the court's construction. The charge did not distinguish between verbal and physical obstructions. As interpreted by the trial court, a crime is committed under the statute any time a person completes any act which might naturally and probably result in public inconvenience by causing an obstruction of pedestrian traffic. This brings the case within the doctrine of Ashton v. Kentucky, supra.

The question remains whether the petitioner, as a hard-core violator, should be able to reap the benefits of the argument. The answer must be in the affirmative for the same reason that he should be permitted to attack the statute for vagueness in the first place. Where a statute is so bereft of standards so as to offer no guidance to the individual, the police or the trier of fact as to what conduct will result in criminal liability, it is unconstitutionally vague to all who are prosecuted under it. Smith v. Goguen, supra.

V. CONCLUSION

For the above reasons, 13 V.S.A. Sec. 1026(5) should be declared invalid under the First and Fourteenth Amendments and petition for a writ of habeas corpus should be granted.

Dated: February 4, 1975

Respectfully submitted,

Richard S. Kohn
American Civil Liberties
Union of Vermont, Inc.
43 State Street
Montpelier, Vermont 05602

Attorney for the petitioner

ADDENDUM

Footnote 13 p. 24:

13/ Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951); Amsterdam, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 73-74 n.34 (1960).

aclu American Civil Liberties Union of Vermont
43 State St., Montpelier, Vt. 05602 - 802-223-6304

February 3, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
U.S.Courthouse
Foley Square
New York, New York

RE: Arbeitman v. District Court
Docket No. 74-2509

Dear Mr. Fusaro,

Please find enclosed twenty-five copies of the appellant's brief in the above captioned case. Two copies have been sent to Richard Finn, Esq., Ass't Att. Gen. for the State of Vermont. Thank you.

Very truly yours,

Richard S. Kohn

Richard S. Kohn

cc. Richard Finn, Esq. Ass't. Att. Gen.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2509

DAVID ARBEITMAN,
Petitioner-Appellant

v.

DISTRICT COURT OF VERMONT,
UNIT NO. 5, WASHINGTON CIRCUIT:
HON. JOHN P. CONNARN, PRESIDING JUDGE,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF OF PETITIONER-APPELLANT

Richard S. Kohn
American Civil Liberties Union of Vermont, Inc.
43 State Street
Montpelier, Vermont 05602